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April 18, 1989

BY FEDERAL EXPRESS

Mary L. Fulghum, Esq.
Assistant Regional Counsel
U.S. Environmental Protection
Agency - Region V
230 South Dearborn Street
Chicago, Illinois 60604

Re: WCI Freezer Division (St. Cloud, Minnesota)
White Consolidated Industries, Inc.

12-
544-5543

Dear Ms. Fulghum:

Following up on our telephone conversations on March 16 and April 13, 1989, I am writing to provide an update on activities being undertaken by White Consolidated Industries, Inc. ("WCI") to develop an agreed voluntary sampling program for WCI's St. Cloud Facility. In addition, some general discussion on the appropriate scope of U.S. EPA's inspection, sampling and corrective action authority under RCRA seems appropriate to respond to the claims made in your February 10, 1989 letter. By the way, I have already discussed the status of this matter with Kevin Veach at the MPCA, and attempted to reach Allen Debus (who has not yet had a chance to return my April 13 telephone call) as you suggested.

While I appreciate your interest in wanting to resolve the details of this matter quickly, WCI considers any situation like this involving drilling of monitoring wells and soil borings to be a matter requiring careful consideration. Thus, when I received your letter three months after my previous November 16, 1988 correspondence to Charles Slaustas, I began working with WCI representatives at the St. Cloud facility and at WCI's head-quarters, and with independent environmental consultants, to carefully evaluate the Agency's position and proposal. As I told you in our telephone conversation last Wednesday, I had already arranged to meet with representatives of the company and its

consultant in Minnesota on April 18 to finalize revisions to the Work Plan being prepared for submission to U.S. EPA and the MPCA. After our meetings this week, a final Work Plan for the site investigation will be submitted to Allen Debus and Kevin Veach. Since the Work Plan will include an upgradient monitoring well as requested by the Agency, I do not anticipate that we should encounter any substantive problems in finalizing this matter.

While WCI continues to dispute the regulatory claims asserted by the Agencies, the company is proceeding with development of a voluntary investigation to avoid unnecessary confrontation over these issues. In light of this fact, your statement that the Agency was contemplating referral of this matter to the Department of Justice to obtain a warrant (rather than to continuing to working cooperatively with WCI), is quite disconcerting, particularly given your stated reason that this would be "easier" for your personal schedule since you were "too busy" to continue spending time on this "very small matter." WCI does not consider this to be a small matter, however, and has chosen to carefully consider the issues presented and voluntarily invest its own resources. The suggestion that the Agency would consider referral to the Department of Justice and initiation of unnecessary litigation, for purposes of individual workload convenience, subverts the avowed purpose of being a governmental agency providing good faith interaction with individual and corporate citizens. Since it took the Agency three months to provide a three-page response to my November 16, 1988 letter, it is hardly unreasonable for WCI to carefully consider the Agency's position and develop a final Work Plan with outside consultants over a shorter period of time.

In response to the claims made in your February 10, 1989 letter, I would first like to reiterate that Section 3007(a) of RCRA, 42 U.S.C. § 6927(a), does not apply in broad brush fashion to WCI, since that provision only permits the agency "to enter at reasonable times any establishment or other place where hazardous wastes are or have been generated, stored, treated, disposed of, or transported from; [and] to inspect and obtain samples from any person of any such wastes and samples of any containers or labeling for such wastes." 42 U.S.C. 6927(a) (emphasis supplied). An essential prerequisite to U.S. EPA's authority, therefore, is that the establishment entered is a place where there has been activity with respect to "hazardous wastes." Your claim that "[t]he Agency can not countenance an interpretation that would

emasculate its ability to pursue RCRA's broad remedial goals" is simply irrelevant. The words of the statutes and applicable regulations are controlling, regardless of the Agency's alleged frustration with the plain meaning of those words. Quite simply, U.S. EPA's authority under Section 3007(a) does not apply expansively to, for example, the closed pre-RCRA holding pond area or the RCRA-exempt empty drum storage area.

You have cited two cases in contending that U.S. EPA would have virtually unlimited authority to sample and monitor at WCI's facility under Section 3007(a), namely United States v. Northeastern Pharmaceutical, 810 F.2d 726 (8th Cir. 1986) and United States v. Price, 523 F. Supp. 1055 (D.N.J. 1981). Both of these cases are quite distinguishable and inapplicable to the present situation, because they address the applicability of Section 7003 to inactive waste sites, not Section 3007. Section 7003 of RCRA, 42 U.S.C. Section 6973, which is clearly distinct in scope and purpose from Section 3007, provides U.S. EPA with authority to bring an injunctive action where there is evidence of "an imminent and substantial endangerment to health or the environment" from the handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste.

United States v. Price was a Section 7003 action brought by the United States to enjoin the alleged leaching of hazardous wastes from an inactive landfill into the groundwater. In Price the defendant landfill owner argued that Section 7003 of RCRA was purely prospective, designed to prevent future dumping in some circumstances, but not to remedy the effects of past pre-RCRA waste disposal practices. Significantly, the District Court of New Jersey first concluded that the "imminent hazard" provision under Section 7003 of RCRA does not authorize general cleanup of dormant waste disposal sites. United States v. Price, 523 F. Supp. at 1071. The court agreed that the landfill owner's argument on the prospective nature of RCRA had some merit, but declined to grant summary judgment to the landfill owner on that basis that there might have been "continued leaking" presenting an imminent hazard. Id. at 1070-71. The court never addressed U.S. EPA's sampling, inspection or monitoring authority under Section 3007(a) of RCRA, which is distinct from Section 7003 in defined scope and purpose. Therefore, the only conclusion that can be drawn from United States v. Price is that the District

Court of New Jersey did not conclude as a matter of law on summary judgment that Section 7003 was inapplicable to the leaching of contaminants from an inactive pre-RCRA landfill.

Similarly, in United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726 (8th Cir. 1986), the court was not construing Section 3007(a) of RCRA, but was focusing on U.S. EPA's authority under Section 7003(a) to seek injunctive relief in an "imminent hazard" situation. Unlike the situation in Northeastern Pharmaceutical or the other cases that you cited, there is no evidence that WCI's St. Cloud facility presents an imminent hazard. Indeed, the Agency has admitted that the purpose of the proposed sampling visit [was] to determine whether releases have ever occurred ...," hardly demonstrating the requisite basis for invoking Section 7003. Neither the statute nor the cases cited in your letter suggest that U.S. EPA's authority to seek injunctive relief to remedy an imminent hazard under Section 7003 extends to entering, sampling or monitoring property where there is no evidence of imminent hazard to human health and environment.

You have also suggested in your letter that U.S. EPA's corrective action authority under Section 3008(h) for facilities authorized to operate under interim status extends to facilities which are not presently authorized to operate a TSD facility. It should first be emphasized that WCI's St. Cloud facility is not required to obtain authorization under interim status, as the Minnesota Pollution Control Agency ("MPCA") has already certified on July 28, 1988. Furthermore, the two cases which you cited addressing Section 3008(h) applicability are simply not applicable or controlling here. The two cases involved facilities that (1) never, but should have, obtained interim status, or (2) lost interim status due to an inability to obtain insurance. United States v. Indiana Wood Treating, 686 F. Supp. 218 (S.D. Ind. 1988) (facility never obtained interim status, but should have); United States v. Clow Water Systems, 1988 U.S. Dist. LEXIS 14666 (facility lost interim status). It is clear that in both situations, and by contrast to WCI, the facilities were required to obtain interim status for treating, storing or disposing hazardous wastes after RCRA's enactment. Since the WCI Freezer

Division in St. Cloud has never operated any RCRA-regulated treatment or disposal facility, and since the MPCA has approved WCI's status as "generator-only," the facility is not and has not been required to seek any RCRA permit.[1]

Finally, it is significant to note that U.S. EPA's authority under Section 3013 of RCRA, 42 U.S.C. § 6934, to issue an order for monitoring, analysis and testing is limited to situations where the presence of any hazardous waste may present a substantial hazard to human health or the environment. First, the Agency does not even purport to be proceeding under this authority at the present time, and no Order has been issued. Second, there is no "hazardous waste" at the facility which may present a "substantial hazard to human health or the environment." Third, as discussed above, the Agency has admitted that it is not aware of any release which would support taking action under Section 3013(d). Further, Section 3013(d) only allows U.S. EPA to conduct such monitoring, testing or analysis if (1) there is no owner or operator able to do the work, (2) the Administrator deems such work to be unsatisfactory, or (3) the Administrator cannot initially determine that there is an owner or operator who is able to do such work. As you are fully aware and have confirmed in your letter to me, WCI has demonstrated its ability and willingness to conduct monitoring, testing and analysis in a satisfactory manner. For all these reasons, Section 3013 is inapplicable to the present situation.

I hope that this letter provides additional insight and resolves our differences as to the scope of U.S. EPA's authority under RCRA so that WCI can proceed with its own sampling and monitoring plan. In any event, WCI reaffirms its continuing policy and practice of working constructively with regulatory agencies whenever possible. Since there does not appear to be a significant substantive dispute on the voluntary investigation to be undertaken by WCI, I anticipate that we should be able to resolve any remaining questions promptly.

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1. Since WCI does not and is not required to operate under interim status, it is not necessary to address your arguments as to whether Section 3008(h) applies to hazardous constituents in addition to hazardous wastes.

If the Agency is still considering referral of this matter to the Department of Justice for unnecessary litigation, however, please advise me immediately and we will make appropriate arrangements. I assume you would, as a matter of professional courtesy, advise us if the Agency decides to seek a warrant so we can concurrently pursue a Motion to Quash or obtain other appropriate relief.

Please do not hesitate to call if you have any questions or if you would like to discuss this matter further.

Sincerely,

Dale E. Stephenson/MLF

Dale E. Stephenson

DES/sce
cc: Charles B. Slaustas
Allen A. Debus
Kevin Veach
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